Supreme Court, U.S.
FILED
SEP 15 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 74-1600

ANTHONY M. SALONE, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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Although the government does not oppose certiorari in this case or *Chandler* v. *Roudebush,* No. 74-1599, and petitions for a writ of certiorari in *United States* v. *Sperling,* No. 75-247, the government suggests that the Court grant certiorari only in *Chandler,* and defer action in this case and *Sperling.* Petitioner maintains that certiorari should be granted in all three cases.

This Court has granted certiorari in related cases where the question presented was susceptible to a variety of answers some of which might lead to differing dispositions of those cases. This practice avoids the need for successive grants of certiorari and permits the Court to fashion a rule in the context of a variety of situations requiring concrete application, rather than in the abstract. See e.g. *Furman* v. *Georgia,* 408 U.S. 238 (1972); *compare United*

States v. *Ortiz*, 45 L.Ed 2d 623 (1975) *with United States* v. *Brignoni-Ponce*, 45 L.Ed. 2d 607 (1975). In litigation under section 717 the lower courts have fashioned more than half a dozen different standards as to when a *de novo* trial is required. Petition 11-13.

Sperling, *Chandler* and *Salone* present a variety of factual situations. Petitioner Chandler sought unsuccessfully to engage in discovery; respondent Sperling indicated a willingness to submit his case on the administrative record, but insisted the court make an independent determination as to whether there was discrimination;[1] petitioner Salone's case was dismissed before he could begin discovery, and the merits of his case must turn, *inter alia*, on the credibility of witnesses who never were required to testify in court. In Salone's case, though not in all others, the administrative record involved conflicts in sworn testimony. In *Salone* both the investigator and the hearing officer found for petitioner only to be reversed by higher authorities; in *Sperling* no such finding was made. Mr. Salone was represented in the administrative proceeding by an attorney; petitioner Chandler was not. Although petitioner maintains that a *de novo* hearing is required in all three cases, the Court might choose to formulate a standard under which the factual differences among these cases would be of significance; such a formulation should be based on a familiarity with the broad diversity of circumstances present in federal employment litigation and revealed by *Salone*, *Chandler* and *Sperling*.

The courts of appeals decisions in these three cases differ so widely that a decision in any one case might not be dispositive of the others. The Ninth Circuit in *Chandler* afforded petitioner an independent decision on the merits

[1] 515 F.2d 465, 460 (3d Cir. 1975).

but forbade the introduction of additional evidence, whereas the Tenth Circuit in *Salone* both forbade such evidence and declined to require such an independent decision; thus if *Chandler* were affirmed on the ground that further evidence could not be introduced, *Salone* would thereafter have to be heard to consider whether the Tenth Circuit erred in not requiring the decision afforded by the Ninth Circuit. Conversely, if *Chandler* were reversed on the ground that that petitioner was entitled to introduce additional evidence, certiorari would then have to be granted in *Sperling* to decide the appropriate standard where no such evidence was proffered.

Even where a single question of law is at issue, several cases are appropriately considered together if the Court's decision ought to reflect a knowledge of the factual situation in which that question arises as revealed by a variety of cases. See e.g. *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *compare N.L.R.B.* v. *J. Weingarten, Inc.*, 43 L.Ed 2d 171 (1975) *with I.L.G.W.U.* v. *Quality Mfg. Co.*, 43 L.Ed. 2d 189 (1975). Resolution of the *de novo* issue would be aided by understanding of the federal administrative processes for handling complaints of employment discrimination. While petitioner maintains that a *de novo* trial is required by both the language and legislative history of Title VII, that conclusion is also supported by the grave defects of the administrative process. Petitioner contends that that process does not and is not designed to unearth the relevant evidence, and that the fact finding process is so tainted by a conflict of interest on the part of the defendant agency as to be inherently unreliable. See Brief for Petitioner in *Brown* v. *General Services Administration*, No. 74-768. The severe limitations in the administrative process is best perceived in the context of several different cases in which the administrative complaints were

processed in a variety of ways and rejected for different reasons.

The only reason suggested by the government for granting certiorari solely in *Chandler* is that the government maintains that the judgment in *Chandler* "is correct," but makes no such assertion as to the judgment in *Salone* and does not claim that *Sperling* was wrongly decided. The government's belief that it is more likely to prevail in *Chandler* than in *Salone* or *Sperling* is not, however, among the factors which the Court considers in exercising its discretion to grant certiorari. See Rules of the Supreme Court Rule 19(1).

For these reasons certiorari should be granted in all three cases to review the conflicting decisions in *Salone, Chandler* and *Sperling.*

Respectfully submitted,

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